United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1560

To be argued by
FRANK A. LOPEZ
(10 minutes requested)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1560

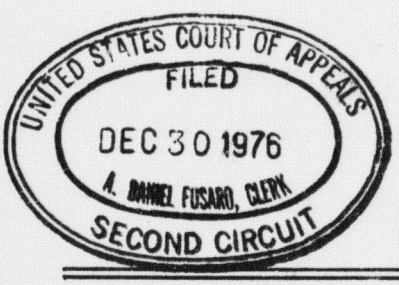
UNITED STATES OF AMERICA,
Appellee,

—v.—

GERALD JOSEPH GERARDI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
(BRAMWELL, *D.J.*)

BRIEF IN BEHALF OF APPELLANT GERALD JOSEPH GERARDI



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Question Presented for Review

On January 13th, 1976, the defendant-appellant Gerald Joseph Gerardi,[1] was arraigned on an indictment filed against him on November 11th, 1975, charging him with conspiracy under 18 U.S.C. § 371, to commit bank robbery in violation of 18 U.S.C. § 2113(a) and (d). The District Court assigned counsel. On April 6th, 1976, Gerardi withdrew his plea of innocence and entered a plea of guilty as charged. Prior to sentence Gerardi sought the withdrawal of his guilty plea and trial by jury. The District Court denied the application and instead pronounced judgment upon Gerardi.

[1] Hereinafter referred to as "Gerardi".

The question presented for review is:

1. Was it fair and just for the District Court not to freely allow the defendant to withdraw his guilty plea prior to sentence on (a) a claim of innocence; (b) a hesitant plea of guilty; (c) without prejudice to the Government's case; (d) the availability of witnesses favorable to the accused not previously accessible; and (e) a motion timely made?

Preliminary Statement

On October 15th, 1976, in the United States District Court for the Eastern District of New York, the Honorable Henry Bramwell, District Judge, after denying Gerardi's application for the withdrawal of his guilty plea pursuant to Federal Rules of Criminal Procedure, Rule 32(d), imposed a sentence of four (4) years under 18 U.S.C. § 4205(b)(2), concurrent with a judgment of eight years entered against Gerardi in the United States District Court for the District of Massachusetts.[2] District Judge Bramwell's sentence followed a plea of guilty by Gerardi to 18 U.S.C. § 371, conspiracy to violate the bank robbery statute, 18 U.S.C. § 2113(a)(d).

This is an appeal from the improvident denial of Gerardi's motion for the withdrawal of his guilty plea prior to sentence pursuant to Rule 32(d), Federal Rules of Criminal Procedure.

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[2] This conviction was obtained after trial in the United States District Court for the District of Massachusetts for violation of 18 U.S.C. § 371, conspiracy to sell stolen securities and the substantive count 18 U.S.C. § 2315. Gerardi received a cumulative sentence of eight years. The case is presently on direct appeal to the United States Court of Appeals for the First Circuit (Docket No. 76-1153). Obviously, if the conviction is reversed Gerardi will still have to serve the instant sentence.

Statement of the Case

(1) Government's Theory of the Case

The Government claimed that from about and between September 9th, 1975, and November 4th, 1975, Gerardi and two confederates, Anthony Juliano and Marshal Schreter,[3] were under surveillance by the Federal Bureau of Investigation and New York law enforcement officials. It would be the prosecution's claim that during this period Gerardi, Juliano and Schreter either individually or in the company of one or the other visited a dozen different bank in Brooklyn, Queens and Nassau Counties. The Government maintained that the purpose was bank robbery and that getaway or escape routes were tested, notes were made, placement of stolen automobiles effected for use as switch and escape vehicles. Two of the banks visited by Gerardi were the subject subsequently of attempted robberies by Schreter and Juliano. Gerardi, the Government would allege, was seen exiting Schreter's residence carrying certain distinctive bags. Gerardi and Schreter were observed carrying the distinctive bags to premises at 172nd Street, Queens, New York. A subsequent search of those premises revealed, among other things, a carbine, sawed-off shotgun, eleven loaded revolvers, ski masks, plastic masks, smoke grenade, numerous (master) car keys, clothing, fake identification papers. Against Gerardi the Government would also seek to introduce prior similar acts committed by him relating to his possession of weapons and masks in the case

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[3] Juliano and Schreter were also indicted with Gerardi. Schreter pleaded guilty on the instant case to armed bank robbery, 18 U.S.C. § 2113(d) and was sentenced on July 23rd, 1976, to a term of twenty-four years. Juliano pleaded guilty to bank robbery, 18 U.S.C. § 2113(a) and on June 11th, 1976, was imprisoned for a term of twenty years. Neither Schreter and Juliano sought to withdraw their guilty pleas nor are they parties to this appeal.

for which he was convicted in the United States District Court in Boston.

(2) Gerardi's Claim of Innocence

Gerardi maintained his innocence in the District Court and at the time of his sentence and interview by the Probation Department. Gerardi denied that he had conspired with either Schreter or Juliano in any plan or attempt to rob any bank in Brooklyn, Queens or Nassau County and that he was not a participant in the placement of any automobiles or stolen vehicles as getaway cars. Moreover, the allegation of notes reference projected bank robberies was a fabrication at least as to him and that at no time was he ever in possession of any firearms, weapons or other instrumentalities for the commission of any bank robbery and escape therefrom. The "similar conduct evidence" alluded to by the Government to the effect that he previously possessed firearms and masks in his Boston federal case was spurious and simply was not a fact in that the Government in the Massachusetts prosecution never made the claim that Gerardi actually possessed either. Furthermore, the similar conduct evidence proferred by the Government was proscribed by *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967).

Of paramount importance was Gerardi's claim that both Schreter and Juliano would testify at his trial exonerating him of any conspiratorial acts set forth in the indictment. Moreover, Gerardi was certainly advised by the Court and both his assigned and retained counsels that it was the Government's burden to prove and establish his guilt beyond a reasonable doubt.

(3) The Proceedings in the District Court

On November 3rd, 1975, arrest and search warrants issued for Gerardi, Juliano and Schreter and for premises

in Brooklyn and Queens. These warrants were executed on November 4th, 1975. Schreter was arrested in Queens, Gerardi in Boston, and Juliano remained a fugitive until the end of March, 1976, when he was apprehended in Virginia. At the time of his arrest Gerardi was on trial in the United States District Court in Boston, and was therefore arraigned before a United States Magistrate in that city. He therefore, was not the subject of the search warrants nor in possession of the items and instrumentalities seized in New York.

The New York Eastern District indictment was filed November 11th, 1975, but Gerardi was not arraigned until January 13th, 1976, because of his trial in Massachusetts. Gerardi entered a plea of "Not Guilty" before the Honorable Henry Bramwell, District Judge.

On February 27th, 1976, Gerardi appeared with assigned counsel before District Judge Bramwell and a trial date set for May 10th, 1976. However, as a result of the apprehension in Virginia of Juliano and his arraignment on March 30th, 1976, a calendar appearance was scheduled before District Judge Bramwell for April 6th, 1976.

On April 6th, 1976, before Judge Bramwell, Schreter pleaded guilty to armed bank robbery, 18 U.S.C. § 2113 (d). Juliano pleaded guilty to bank robbery, 18 U.S.C. § 2113 (a) and Gerardi pleaded guilty to conspiracy to commit armed bank robbery, 18 U.S.C. § 371, the single count against Gerardi in the indictment filed against him. The manner in which this plea was obtained from Gerardi will be described on the argument contained herein.

On June 11th, 1976, Juliano was sentenced to a term of twenty (20) years and the sentence of Gerardi and Schreter scheduled for this date was adjourned on application of the Government as a result of telephone communications from defense counsel requesting same.

Schreter was sentenced on July 23rd, 1976, to a term of twenty-four (24) years, and court assigned counsel for Gerardi obtained a further adjournment until September 24th, 1976.

On September 24th, 1976, Gerardi substituted retained for assigned counsel and on that day an application was returnable before the Court for withdrawal of his guilty plea of April 6th, 1976. The matter was adjourned by the Court to a subsequent date.

On October 8th, 1976, the matter was again adjourned until October 15th, 1976, because Gerardi's retained counsel was actually engaged elsewhere on trial.

On October 15th, 1976, Gerardi's application for the withdrawal of plea was denied under circumstances that will be described shortly and he was sentenced to a term of four (4) years concurrent with the federal sentence imposed in Massachusetts. Judge Bramwell's sentence was entered pursuant to 18 U.S.C. § 4205 (b).

ARGUMENT

POINT I

The District Court Improvident Denial of Gerardi's Application for the Withdrawal of his Guilty Plea was clearly erroneous.

A. Application Prior To Sentence: "Freely Allowed"

Rule 32(d) of the Federal Rules of Criminal Procedure provides the vehicle for the withdrawal of a guilty plea addressed to the sound discretion of the Court. Rule 32(d) indicates:

> "Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Gerardi moved diligently prior to sentence to vacate his guilty plea of April 6th, 1975, and while no defendant has an absolute right to withdraw a guilty plea prior to the imposition of sentence, *Kercheval* v. *United States*, 274 U.S. 220 (1927); *U.S. ex rel. Scott* v. *Mancusi*, 429 U.S. 104 (2d Cir. 1970) *cert. denied*, 402 U.S. 909; *United States* v. *Giuliano*, 348 F.2d 217 (2d Cir. 1965), *cert. denied*, 382 U.S. 939; such withdrawals prior to judgment have been freely allowed. *United States* v. *Young*, 424 F.2d 1276 (3d Cir. 1970); *United States* v. *Erlenborn*, 483 F.2d 165 (9th Cir. 1969). In *United States* v. *Stayton*, 408 F.2d 559 (3d Cir. 1969) the Court pointed out that motions prior to sentence for the withdrawal of guilty pleas as contrasted with those applications subsequent to the imposition of sentence "should be construed liberally in favor of the accused." The *Stayton* court cited with favor *Kirschberger* v. *United States*, 392 F.2d 782 (5th Cir. 1968); *Kadwell* v. *United States*, 315 F.2d 667 (9th Cir. 1963); and *Poole* v. *United States*, 250 F.2d 396, 400 (D.C. Cir. 1957) where the Court was quoted as stating:

> "Leave to withdraw a guilty plea prior to sentencing should be freely allowed."

An examination of Rule 32(d) provides for two standards to be applied to applications for the withdrawal of guilty pleas. Prior to sentence the view is to protect the right of the accused to a trial while withdrawal mo-

tions after sentence are to be tested by a higher standard to prevent applications inspired by sentence dissatisfaction. The test as to the application prior to sentence is "for *any reason* the granting of the privilege seems *fair and just.*" *Kercheval* v. *United States, supra,* at p. 224. The standard after sentence to be applied is denial of the motion unless "manifest injustice" to the defendant will result. *Sullivan* v. *United States,* 348 U.S. 170 (1954).

Gerardi is in a pre-sentence setting and is governed by the test of what is fair and just. His application should therefore be freely allowed only if the Government can show substantial prejudice. *United States* v. *Stayton, supra,* pp. 561-562. Examples of such prejudice is where the statute of limitations has run on charges which have been dropped as a result of a guilty plea or as in *Farnsworth* v. *Sanford,* 115 F.2d 375 (5th Cir. 1940) where the Government was substantially prejudiced by having dismissed 52 witnesses as a result of defendant's plea of guilty.

B. Reasons for Granting the Motion

Gerardi in his application to the District Court advanced five reasons why his motion for the withdrawal of his guilty plea should be granted:

1. Gerardi proclaimed his innocence and asked the Government to be put to its test of proof beyond a reasonable doubt;

2. The Court failed to properly comply with F.R.C.P. Rule 11, and Gerardi's plea of guilty was equivocal and involuntary under the circumstances;

3. The Government was not prejudiced by the withdrawal of the guilty plea;

4. Schreter and Juliano, not previously available as witnesses to Gerardi, were prepared to testify in his behalf and exonerate him of the conspiracy charge;

5. The withdrawal motion was timely made.

Under these assertions by Gerardi even under the higher standard of "manifest injustice" applicable in a post-sentence circumstance the motion should have been allowed. *United States* v. *DeCalvalcante*, 449 F.2d 139 (3d Cir. 1971).

(1) Gerardi Proclaimed His Innocence

Gerardi immediately after plea advised the Probation Department that he was innocent of the charges and in his motion for withdrawal of the guilty plea so advised the Court. Gerardi did not participate in any attempted bank robbery, never had in his possession weapons or criminal instrumentalities for the perpetration of the crime. The Government's hope was exclusively to raise such an inference. At most, the Government's case rested on the showing that Gerardi visited some banks or accompanied Schreter in doing so. The Government's claim that it could sustain its conspiracy charge against Gerardi was based on the slightest of inferences in that Gerardi in the company of one of the co-defendants visited banks in Brooklyn, Queens and Nassau Counties. There was nothing else and for this reason was satisfied to extract a felony plea from Gerardi and recommend concurrent time and that Gerardi's unexpired parole run concurrently with the four-year sentence. The assertion by Gerardi of his innocence was an important factor whether it was "fair and just" to grant the presentence withdrawal application. *United States* v. *Barker*, 514 F.2d 208 (D.C. Cer. 1975), *cert. denied*, 95 Sup. Ct. 2420; *United States* v. *Norstrand*, 168 F.2d 481 (2d Cir. 1948); *Leano* v. *United States*, 457 F.2d 1208 (9th Cir. 1972).

Moreover, none of the firearms and other instrumentalities seized by law enforcement officials pursuant to search warrant were found on Gerardi or in premises owned or occupied by him. As a matter of fact, Gerardi was on trial in Boston, Massachusetts at the time of the execution of the warrants.

(2) The April 6th, 1976, Plea Was Involuntary and Did Not Comply With Rule 11, F.R.C.P.

It is quite apparent from the reading of the plea minutes of April 6th, 1976, that Gerardi did not fully understand the nature of the charge to which he was pleading, was equivocal in his responses to the Court as to this guilt, and was in a mental state of confusion and fear as a result of a recent federal conviction in Boston.

Prior to plea, Schreter, Juliano and Gerardi met and Schreter and Juliano announced their decisions to plead guilty. Gerardi not realizing the impact of the decisions by Schreter and Juliano felt that he had no other choice but to go along with the plea. When Gerardi advised his assigned counsel that he would take the plea, Mr. Jones, attorney indicated to the Court at the time of the guilty plea withdrawal hearing (transcript, October 15th, 1976, p. 4):

> ". . . my intention from the beginning was to try this case . . . . and as a matter of fact, I was personally working to try this case. . ."

Mr. Jones advised the Court that he asked Gerardi, "If he was entering a plea in fact because he was guilty, or as an accommodation, he said . . . something to the effect that he had taken a shot like this in Boston and it didn't work out, and he was critical [equivocal] as to his guilt or innocence" (transcript, October 15th, 1976, pp. 5-6).

In any event, when Gerardi appeared before the Court on April 6th, 1976, the Court questioned him with regard to his plea (transcript, April 6th, 1976, p. 36):

> "The Court: Were you involved in this anyway?"
>
> "Defendant Gerardi: Into stealing from the banks?"
>
> "The Court: Into stealing from these banks."
>
> "Defendant Gerardi: No. sir."

At p. 37, the following exchange takes place:

> "The Court: Was there a conspiracy between yourself and Mr. Schreter to do something?"
>
> "Defendant Gerardi: The way I understand the conspiracy right now, I have to say—"
>
> "The Court: A conspiracy is an agreement. Was there a crimnial agreement between yourself and Mr. Schreter?"
>
> "Defendant Gerardi: Well, I guess I'll have to say, yes."

At pp. 37-38, the following ensues:

> "The Court: . . . What was the purpose in looking at the banks? What was your purpose in driving in the vicinity and looking at the banks?"
>
> "Defendant Gerardi: I believe riding in the vicinity for a later date to be robbed, *I guess.*" (stress supplied)

Under these circumstances, the plea was at best equivocal even when Gerardi surrendered his innocence to the Court. Gerardi was confused as to his understanding of conspiracy. Gerardi claimed that he was under the im-

pression that he would take a "*Serrano*" or "*Alfred*" type plea and expressed concern that his willingness to proceed to trial in New York would have the same result as in Boston. As soon as he was interviewed by the Probation Department in connection with his presentence report he expressed his innocence. Here we do not have a question of indecisiveness as in *United States* v. *Gonzalez-Hernandez*, 481 F.2d 648 (5th Cir. 1973) but circumstances which require the retraction of the guilty plea.

(3) The Government Is Not Prejudiced

The Government *actually admitted* to the District Court that they were not prejudiced by the Rule 32(d) application and if the case proceeded to trial. In fact the Government argued that since they felt that Schreter, a co-defendant, would willingly cooperate with them, they had now lost him as a witness since Gerardi now maintained that both Schreter and Juliano would exonerate him. Assistant United States Attorney Dawson stated it this way (transcript, October 15th, 1976, pp. 23-25):

> "Mr. Dawson: I had intended to, your Honor. I got cut off after I spoke about a point Mr. Jones had raised which I thought the record should include.
>
> The Government has offered an affidavit which entails, to some extent, the Government's position in terms of what its proof would be. One must prove to the jury what was in an individual's mind, and what that individual intended, and shared in terms of an agreement or understanding with co-conspirators. Quite often that evidence can only take the form of overt acts.
>
> When we proceeded to obtain an indictment, and obtained an indictment in this case we did not

have help of any co-defendant or co-conspirators' testimony. Therefore we relied totally on the evidence outlined in our affidavits. This evidence that is unique in that it gave the Government illumination as to what was the intention of the parties and indeed what roll each of the parties was playing, for the first time the Government had insight into the understanding of the parties involved in this case.

Now, the defendant's applications saying Schroder is prepared to submit affidavits that the defendant is innocent—that is Gerardi is innocent with the contained indictment. The Government finds it's in a position that it has no substantive evidence to offer from Schroder, if defendant calls Schroder to say Gerardi is innocent of this, the Government does use this only for impeachment purposes, not for the truth of what is in it. If the Government calls Schroder in as its own witness, apparently he has had communication with Schroder to the point he knew Schroder is even willing to introduce affidavits. If the Government calls Schroder it must now accept the defendant's statement as true.

He would have to be prepared to hear the defendant Schroder say that Gerardi is innocent and all we can do at that point is, we can't even impeach our own witness, so the Government has lost this very unique piece of evidence which it had several months ago.

Mr. Lopez: Your Honor, I'll not add one word to that statement. As a matter of fact I will rest on it and make the motion now for the withdrawal of the plea again on the basis of his statement. I wouldn't add anything to it.

> Mr. Dawson: I also should say under the case law as submitted in our memorandum, that showing of prejudice to the Government in and of itself is not a grounds for the withdrawal of the motion, that the withdrawal of the motion must take into consideration all of the facts and circumstances of this case, and as your Honor has so clearly indicated in my opinion many of the grounds asserted by the defendant have been nothing but a Schroder plea, and a late blooming attempt to develop a so-called actual issue requiring a hearing. I think all of those issues put a lie to all of the claims in the defendant's affidavit and Government need not show prejudice, but I think we have."

The Government in fact demonstrated no prejudice nor was their any reliance on Gerardi's plea which resulted in some act that depreciated the prosecution's case in any manner. Cf. *United States* v. *Jerry*, 487 F.2d 600 (3d Cir. 1973).

(4) Schreter and Juliano: Newly Available Witnesses:

Whereas prior to their pleas, neither Schreter nor Juliano could properly be called as witnesses without their assertion of the privilege of self-incrimination, as a result of their guilty pleas and the judgments imposed Schreter and Juliano both offered to testify in behalf of Gerardi at any trial to offer evidence of exoneration. Their pleas were not dependent on Gerardi nor was this a "package" disposition of cases by the Government. Gerardi pleaded to the indictment and received as consideration from the Government a "recommendation". Nothing in his plea was predicated on the decisions of either Juliano or Schreter. From an evidentiary viewpoint,

Gerardi's trial posture balancing the weakness of the Government's case with exculpatory evidence to be furnished in his behalf by both co-defendants made it fair and just to permit him to withdraw his guilty plea.

(5) The Withdrawal Motion Was Timely Made

The District Court did not specifically state the grounds for its denial of Gerardi's application albeit it appeared that it was not timely made (transcript, October 15th, 1976, p. 16):

> The Court: After hearing Mr. Jones the motion to vacate is denied.
>
> Mr. Jones: If your Honor please, I add one more thing. As the Court is aware Mr. Gerardi had been convicted in Boston, Massachusetts of a different situation entirely. And I think it was his feeling at the time that since the matter was on appeal he felt very strongly that it would be overturned on appeal. And I think there came a point when he wanted to reconsider the plea he had entered in this case. Now,——
>
> The Court: There was a point. There is no question about that. There was a point when he wanted to reconsider, to the best of my recollection at the time the plea was taken—it was later on.
>
> It appears to be possibly—it appears to be possibly subsequent to the date it was first set down for sentence.

While there is no time limitation on a motion to vacate a plea, especially before sentence, delay may have, however, a catalytic effect on the claim of good faith. *United States* v. *Washington*, 341 F.2d 277 (3d Cir. 1968), *cert. denied*, 382 U.S. 850.

Here the Court was not satisfied that Gerardi moved with sufficient diligence. However, this was indeed against the representations made by assigned counsel before the Court on October 15th, 1976 (Transcript, October 15th, 1976, pp. 8-9):

> "Mr. Jones: After the plea was entered a couple of weeks after we entered the plea, I believe the first of the co-defendants was sentenced, I don't know which date because I wasn't here.
>
> Mr. Dawson: I think the record is June 11, Mr. Juliano was sentenced about two months from the entry of the plea.
>
> Mr. Jones: And Mr. Gerardi called me on the telephone at my office, I believe it was from the Metropolitan Correction Center. He advised me that on reconsideration of his position that he wanted me to make an application to this Court to withdraw his plea.
>
> The Court: Was this before or after the case was set down for sentence?
>
> Mr. Jones: Before. Again, the sentence didn't come to me through mail, this was shortly after the plea was entered. What I did was on that same date, because I can tell by the date of my affidavit, June 18. I made the application, I drew the papers that same day, because I felt that the more time that passed it would appear that we would be dilatory, so I immediately drew an application to withdraw the plea with supporting affidavits, but the problem then became that Mr. Gerardi was moved to Boston and I could not file the papers until he signed."

The District Court's reasoning as to the date of the intention to withdraw Gerardi's guilty plea is somewhat

surprising in that it was certainly prior to sentence and before Gerardi knew what the sentence would be. It would seem that the policy of the law would favor Gerardi's right to trial in that this certainly was not a matter of dissatisfaction with the sentence imposed. Gerardi's good faith application is certainly established by his statement to the Probation Department, his withdrawal request to his assigned and retained counsel and finally to the Court.

CONCLUSION

For all the above-stated reasons, this Court should reverse the Order denying the application for the withdrawal of appellant's guilty plea, vacate the sentence and judgment of conviction and remand the case for trial, together with such other relief as may be just and proper.

Respectfully submitted,

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